

IN THE COUNTY COURT
SEVENTH JUDICIAL CIRCUIT
VOLUSIA COUNTY, FLORIDA

CITY OF DAYTONA BEACH

v.

Case No. 2011-45093MMAES
2011-44828MMAES
2011-44921MMAES
2011-45091MMAES
2011-45094MMAES
2011-45097MMAES
2011-45098MMAES
2011-45594MMAES
2011-45595MMAES
2011-45596MMAES
2011-45986MMAES

WILLIAM BRADFORD CARTER, et al.

/

ORDER GRANTING MOTION TO DISMISS

In these eleven consolidated cases, the Defendants move to dismiss on the ground that the criminal ordinance for which they were all cited, "Sleeping," is unconstitutional on its face and as applied. This Court agrees that this municipal ordinance is unconstitutional under the United States and Florida Constitutions in that it violates due process, is subject to arbitrary enforcement, and impermissibly seeks to criminalize involuntary conduct. The Motion to dismiss is therefore GRANTED. All people must sleep. Most people sleep at night. People with nowhere to sleep are not criminals merely because they sleep in public place. It is beyond the purview of the City's police power to make sleeping in public a crime.

1. Ordinance

The City of Daytona Beach has a municipal ordinance numbered 86-32, entitled "Sleeping." This ordinance makes it a second degree misdemeanor offense, punishable by a maximum of sixty days in jail and or a fine of \$500, to commit the following acts:

- a) No person shall sleep on any of the city streets, sidewalks, alleys, rights-of-way, or easements between the hours of 11:00 p.m. and 6:00 a.m. the following morning.
- b) No person shall lodge or sleep in the open on private property, in vacant lots, in or under any bridge or structure, or in any railroad car between the hours of 11:00 p.m. and 6:00 a.m. without owning such or without permission of the owner or person entitled to possession of such.

There is a separate ordinance defining and prohibiting "camping." City of Daytona Beach Ord. 86-42. Presumably any health and safety concerns occasioned by open campfires, lack of sanitary facilities, or other similar issues are addressed by prohibiting "camping." Likewise, there is a separate municipal ordinance and state criminal statute prohibiting trespassing.

2. Facts

The parties have agreed to use the charging documents in these eleven cases as the stipulated facts. The charging document is Form 702, 7th Judicial Circuit, Misdemeanor Charging Affidavit, which looks like a traffic ticket or citation. Additionally, as an appendix to this order, the facts of an

additional 29 cases currently pending arraignment before the Court are listed. The Court takes judicial notice of these additional 29 pending cases. § 90.202(6), Fla. Stat. (2011).

2011-45092MMAES, Carter, William Bradford: On August 22, 2011, at 12:49 a.m., Mr. Carter "...was observed sleeping on bus stop bench in the 100 block of Ridgewood Avenue..." and issued a citation by Officer Matthew Booth. Mr. Carter's address is listed as 340 North Street, the address of the homeless shelter.

2011-44828MMAES, Wantland, Mike Charles: On August 13, 2011, at 12:21 a.m., Mr. Wantland was observed "sleeping on a city bench at White Street and ISB." The citation was issued by Officer T. Martin. Mr. Wantland's address of record is also 340 North Street. Mr. Wantland also has another pending case charging the same offense. (See Appendix)

2011-44921MMAES, Mullen, Gary J.: On August 19, 2011 at 1:27 a.m., Mr. Mullen "...was observed sleeping on the bench in Breakers Park after the park was closed." Officer M. Cherry issued the citation. Mr. Mullen's address of record has changed three times while this case is pending.

2011-45091MMAES, Perry, Robert Early: On August 22, 2011 at 1 a.m., Mr. Perry was observed sleeping at a bus stop in the 300 block of U.S. 1 and issued a citation by Officer Matthew Booth. Mr. Perry's address is 340 North Street.

2011-45094MMAES, Rakus, Herbert Benjamin: August 22, 2011 at 12:20 a.m. Officer Matthew Booth issued a citation to Mr. Rakus for sleeping on a bus stop bench in the 400 block of US 1. Mr. Rakus' address is 340 North Street. Mr. Rakus also has another pending case charging the same offense. (See Appendix)

2011-45097MMAES, Sullivan, John Lewis: On August 22, 2011, at five minutes past midnight, Officer Matthew Booth issued a citation to Mr. Sullivan for sleeping under the overhang of a public bus stop in the 100 block of Fairview Avenue. Mr. Sullivan's address is 340 North Street.

2011-45098MMAES, Longhini, Robert W.: On August 21, 2011 at one a.m., Officer T. Blowers issued a citation to Mr. Longhini for sleeping on a "porch/public sidewalk" at 330 Madison Avenue. Notices sent to his address of record come back unserved, marked "attempted, unknown, unable to forward."

2011-45594MMAES, Abell, Rickey M: Officer T. Martin issued a citation to Mr. Abell, whose address is 340 North Street, on August 28, 2011 at 5:14 a.m. for sleeping on a public park bench in Breakers Park.

2011-45595MMAES, Bailey, Michael Ian: This consecutively numbered citation is exactly the same facts as Mr. Abell's case. Mr. Bailey listed his address as a post office box in Atlanta.

2011-45596MMAES, Stephens, Isabelle Ann: This is the third consecutive citation with exactly the same facts: same time,

same place, same allegations, same issuing officer. Ms. Stephens also lists her address as a post office box in Atlanta.

2011-45986MMAES, Davis, Scott A: On September 1, 2011, Mr. Scott was issued a citation at 12:23 a.m. for sleeping on a bench in front at 2400 W. ISB. He gave an address in Ft. Lauderdale; the arraignment notice sent by the clerk was returned with a note saying he doesn't live there anymore.

The majority of defendants included in this motion, as well as the nearly all of the 29 cases listed in the appendix which are currently pending before the Court, list the defendant's address as 340 North Street. This is the address of the STAR Shelter, run under the auspices of the Volusia/Flagler Coalition for the Homeless. The parties so stipulated. One of the services they provide to homeless people is to use 340 North Street as a mailing address. The remaining individuals do not appear to have a stable residence, since the address given is a post office box, or the summonses that are sent by the clerk of court to these addresses are returned unserved. Only three individuals out of these 40 cases have any sort of identifiable street address. Therefore, the only conclusion that can be drawn is that almost all of the defendants charged with the crime of sleeping are homeless and so have no place to sleep at night. Moreover, although the City did not so stipulate, the Court

finds as fact that there not enough beds in homeless shelters to meet the demand of all the homeless persons within the city.¹

3. Conclusions of law

One of the most fundamental principles of our system of government is that each of the three branches has a duty to interpret acts of other branches in a manner that uphold their validity. When a court is reviewing an ordinance or law enacted by a legislative body, whenever possible, the court must interpret the ordinance in a manner so as to bring it within constitutional bounds. *Crist v. Ervin*, 56 So. 3d 745 (Fla. 2010); *State v. Bales*, 343 So. 2d 9 (Fla. 1977). However, a court cannot distill legislative intent from mere supposition or rewrite the statute, and the very language of the ordinance itself is the polestar of legislative intent. See, *Wyche v. State*, 619 So. 2d 231 (Fla. 1993).

The Defendants contend that this municipal ordinance violates the Fifth, Eighth and Fourteenth Amendments to the

¹There are at least 2,200 homeless people in Volusia County and only 768 available shelter beds. Daytona Beach News-Journal, "Annual Volusia/Flagler homeless count to finish today" Deborah Circelli, January 25, 2012; Daytona Beach News-Journal, "Volusia Homeless Forum seeks solutions, unity" Andrew Gant, January 22, 2012; www.myhometownnews.net, "Ideas, partnerships formed at homeless forum" Dan Harkins, Jan. 27, 2012. "The number of people falling into homelessness is outstripping our ability to meet the need," said Volusia/Flagler Coalition for the Homeless Executive Director Lisa Hamilton. *Id.*

United States Constitutions, and Article 1, Sections 2, 9, 17 and 23 of the Florida Constitution. Specifically, the defense contends that the ordinance violates substantive due process and is void for vagueness because it fails to give law enforcement officers sufficient direction and leaves the enforcement of the ordinance to the unbridled discretion of the officer. Further, the defense contends the ordinance is overbroad because it criminalizes innocent conduct. The Eighth Amendment argument alleges that it is cruel and unusual punishment to penalize someone for involuntary conduct or the status of being homeless.

A. Due Process

The parties agree that there is no fundamental right to be homeless or to sleep in public, and so this due process claim is governed by the rational basis test. *D'Aguanno v. Gallagher*, 50 F. 3d 877 (11th Cir. 1995).

The test for determining whether a statute violates substantive due process is whether it bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary or oppressive. *Ilkanic v. City of Ft. Lauderdale*, 705 So. 2d 1371 (Fla. 1998); *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004). A valid exercise of a government's police power includes regulation of matters to promote the public safety and health. *Brevard County v. Stack*, 932 So. 2d

1258 (Fla. 5th DCA 2006). It is a very heavy burden to show an arbitrary and unreasonable exercise of a municipality's right to regulate public safety and health. *State v. Sobieck*, 701 So. 2d 96 (Fla. 5th DCA 1997). However, if irrational legislative means have been adopted to realize the given legislative goals, then a constitutional violation exists. *State v. Walker*, 444 So. 2d 1137 (Fla. 2d DCA 1984).

The City contends that its ordinance was enacted to promote the goals of safety and sanitation, and to improve aesthetics. Although the Court agrees that these are valid governmental purposes, the ordinance as written is too attenuated from these legitimate goals to withstand constitutional scrutiny. *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986) (means chosen to enforce police power must bear a rational relation to a proper goal); *Nordlinger v. Hahn*, 505 U.S. 1 (1992). There is nothing unsafe or unsanitary about sleeping. There is a separate ordinance, camping, that more directly addresses these concerns.

Even if this ordinance satisfies the rational basis test, it still violates due process if it is impermissibly vague. "The void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The defendants agree that their conduct falls squarely within the ordinance, and so they cannot claim that the ordinance is vague on this basis. See, *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982). Rather, they contend that the second part of this test cannot be met by the City.

This corollary of the vagueness doctrine holds that a statute or ordinance that is indefinite "encourages arbitrary and erratic arrests and convictions." *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). Nearly forty years ago, a Florida appellate court first struck down a similar ordinance prohibiting sleeping in a public place on these grounds. *State v. Penley*, 276 So. 2d 180 (Fla. 2d DCA 1973).

In 1984, the Fourth District Court of Appeal reviewed an ordinance making it unlawful for any person to "lodge or sleep" in an automobile. *City of Pompano Beach v. Capalbo*, 455 So. 2d 468 (Fla. 4th DCA 1984). As in *Penley*, the *Capalbo* court concluded that that the ordinance was unconstitutional because it "...criminalizes conduct which is beyond the city's police power inasmuch as conduct 'in no way impinges on the rights or interests of others.' Effective law enforcement does not require that citizens be at the 'mercy of the officers' whim or caprice,' and the just concerns of the public regarding crime must take rational expression and not become a mindless fear

that erodes the rights of a free people." *Capalbo*, 455 So.2d at 471 (internal citations omitted).

The primary basis for invalidating the Pompano Beach ordinance was that it was void for vagueness:

...because it leaves in the unbridled discretion of the police officer whether or not to arrest one asleep in a motor vehicle on a public street or way or in a parking lot. A wide range of persons may violate the sleep-in-the-vehicle statute, from the tired child asleep in his car seat while a parent drives or while the car is parked, to the alternate long-distance driver asleep in the bunk of a moving or parked tractor-trailer, to the tired or inebriated driver who has taken widely disseminated good counsel and chosen to go to sleep in his parked car rather than take his life or others' lives in his hands, to the latter day Okie who has made his jalopy his home. The officer encountering these varied situations is left free to decide for himself whether to enforce the ordinance.

City of Pompano Beach v. Capalbo, 455 So. 2d at 470. An equally wide assortment of people could conceivably run afoul of this ordinance by nodding off while sitting on a public bench watching the sun rise, snoozing in a stroller during an early morning walk, or dozing in a park after a late night stroll with the dog.

The Defendants properly argue that the ordinance is impermissibly overbroad for the same reasons. The ordinance criminalizes essentially innocent conduct that every member of the animal kingdom must do each day: sleep.

The Court notes that two officers wrote eight of the eleven citations to the defendants joined in this motion. Of the 40 cases pending before the court, eleven citations were issued within one hour of the ordinance being effective, i.e. prior to midnight or after 5 a.m. Nineteen more were issued within an hour after midnight. One citation was issued at 11:02 p.m., just two minutes after the ordinance became active, and another was issued at 5:47 a.m. From this evidence, a reasonably prudent jurist could conclude that the ordinance is being enforced in an arbitrary manner.

To further buttress this conclusion, the Court finds that there are no guidelines to channel the discretion of the police in enforcing this ordinance. Cf. *Joel v. City of Orlando*, 232 F. 3d 1353, 1360 (11th Cir. 2000). "Those (MUCOB) guidelines substantially decrease the likelihood that (Orlando's anti-sleeping ordinance) will be subject to arbitrary and discriminatory enforcement." *Id.* The *Joel* court distinguished *Capalbo* and *Penley* on the grounds that in those cases, as here, there were no guidelines for enforcement. *Joel v. City of Orlando*, 232 F. 3d at 1361 n. 6. Orlando's ordinance was upheld because these guidelines recommended no violation existed unless the suspect was in a tent or inside some form of temporary shelter, lying in or under a bedroll or cardboard, or there was a campfire.

The City contends that the ordinance creates specific limits on the time of enforcement, and so provides a "safe zone." They contend that this limitation is a guideline that brings the ordinance within the ambit of the *Joel* decision. See also, *Jones v. City of Los Angeles*, 444 F. 3d 1118 (9th Cir. 2006), vacated by 505 F.3d 1006 (9th Cir. 2007). This argument is misplaced. The "safety zone" referred to in the *Jones* decision and cases cited therein limited enforcement of the ordinances to specific times as well as in specific locations. See also, *Pottinger v. City of Miami*, *infra*. There is no suggestion that the City has set aside a physical location where this ordinance is not enforced.

Other trial courts in Florida have invalidated sleeping ordinances on the authority of *Capalbo*. See, e.g. *Day v. City of Sarasota*, 12 Fla. L. Weekly Supp. 120 (Fla. 12th Cir. Ct, Nov. 19, 2004) ["Without evidence of criminal behavior, the prohibition of this conduct lacks any rational relation to a legitimate purpose and criminalizes activity that is otherwise inherently innocent." Citing, *State v. Walker*, 444 So. 2d 1137, 1140 (Fla. 1986)]; *City of Sarasota v. Nipper*, 12 Fla. L. Weekly Supp. 878 (Fla. Sarasota Co. Ct June 22, 2005). This Court joins many other courts around the nation in finding this anti-sleeping ordinance is unconstitutional.

B. Cruel and unusual punishment

As an additional and independent basis for finding this ordinance to be unconstitutional, the Court also agrees that this ordinance violates the Eighth Amendment of the United States Constitution, and Article 1, Section 17 of the Florida Constitution.

The defendants argue that they are homeless, an involuntary condition beyond their immediate ability to alter. This status requires that they perform the biologically necessary function of sleeping in public. Therefore, they argue that this ordinance which makes it a criminal offense to sleep in public is cruel and unusual punishment. This Court agrees.

For four decades, courts have made a distinction between a voluntary act, like possession of a controlled substance without a prescription, from an involuntary status, like being a drug addict. *Robinson v. California*, 370 U.S. 660 (1962). To penalize an involuntary status violates the Eighth Amendment proscription against cruel and unusual punishment.

The City argues that since the ordinance only prohibits sleeping in public between 11 p.m. and 6 a.m., violation of this ordinance is a volitional act. They suggest that homeless persons should sleep in public in the daytime, and walk the public streets during the night hours, which is constitutionally protected conduct, during the time that this ordinance is

enforced. However, this suggestion runs counter to the stated purpose of promoting the aesthetics in business districts while most people are awake, out and about. This argument is offensive, and more importantly, it impermissibly infringes on personal liberty of people to sleep when they so desire.

In *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965), the Florida Supreme Court invalidated the vagrancy statute on this ground. The Miami ordinance made it a criminal offense to stand, loiter or stroll about the city without the person "being able to give a satisfactory account of himself, or who is without any lawful means of support." In finding this ordinance unconstitutional, the Florida Supreme Court observed that this ordinance punished people who were "innocent victims of misfortune" who neither by "choice or intentional conduct" found themselves to be without a lawful means of support.

Further support for this conclusion is contained in *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992):

In sum, class members rarely choose to be homeless. They become homeless due to a variety of factors that are beyond their control. In addition, plaintiffs do not have the choice, much less the luxury, of being in the privacy of their own homes. Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of

being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless. This effect is no different from the vagrancy ordinances which courts struck because they punished "innocent victims of misfortune" and made a crime of being "unemployed, without funds, and in a public place." Therefore, just as application of the vagrancy ordinances to the displaced poor constitutes cruel and unusual punishment, arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual.

(internal citations omitted)

In a civilized society, it is not a crime to be unemployed, without funds, without shelter, in a public place. All people must sleep. Most people sleep at night. People with nowhere to sleep are not criminals merely because they sleep in public place. To punish the unfortunate among us by criminalizing this conduct debases a free society that honors the basic rights of all of its citizens.

WHEREFORE, based upon the foregoing, this Court hereby finds that this ordinance is unconstitutional on its face and as applied, and GRANTS the Motion to Dismiss. These cases are hereby DISMISSED and CLOSED.

DONE AND ORDERED in chambers at Daytona Beach, Volusia County Florida, this ____ day of February, 2012.

Belle B. Schumann
County Court Judge

I hereby certify that a correct copy of the foregoing Order has been furnished by U.S. mail to Assistant City Attorney Anthony Jackson, City of Daytona Beach, P.O. BOX 2451, Daytona Beach, FL 32115, and to Joseph Warren, 428 N. Halifax Avenue, Daytona Beach, FL 32118, this ____ day of February, 2012.

Linda S. Stewart
Judicial Assistant

APPENDIX

2011-47447MMAES, Styles, Gregory Joseph, 340 North Street.
September 30, 2011, citation issued at 12:04 a.m. for sleeping
in public at 434 N. Ridgewood Avenue.

2011-47464MMAES, Martin, Edward, 340 North Street.
September 27, 2011, 5:41 a.m. citation issued for sleeping on
the sidewalk at the southeast corner of North Ridgewood and
Madison Avenue.

2011-47502MMAES, Williams, Teddy Joe, 340 North Street.
September 24, 2011, 12:45 a.m., citation issued to Mr. Williams
for sleeping at the rear of a business at 1039 Madison Avenue.

2011-47928MMAES, Shunke, Jema, 340 North Street.
October 6, 2011, 11:02 p.m., citation issued for sleeping on the
sidewalk at the corner of Palmetto and Magnolia Avenue.

2011-47929MMAES, Graves, Carnell L, Deltona address.
October 11, 2011, citation issued for sleeping on the sidewalk
in front of 135 Jean Street at 3:55 a.m.

2011-48044MMAES, Range, Timothy W. 560 Ballough Road, Daytona
October 12, 2011, at 12:44 a.m., citation issued for "sleeping
under the overhang at 147 Jean Street."

2011-48459MMAES, Wantland, Michael C. 340 North Street
October 20, 2011, 1:37 a.m. Mr. Wantland was observed sleeping
under the car wash port at 127 S. Nova Road.

2011-48472MMAES, Rakus, Herbert, 340 North Street
October 16, 2011, 12:17 a.m., was cited for sleeping on a bench
at Ridgewood and Hobart.

2011-48582MMAES, McLendon, Forrest, 340 North Street
October 26, 2011 at 2:40 a.m. cited for sleeping on a bench in
the 200 block of Ridgewood Avenue.

2011-49314MMAES, Jones, William Lee, 340 North Street
November 2, 2011, 23:55 p.m., cited for sleeping on the sidewalk
in front of 351 Mary Mcleod Bethune Blvd.

2011-49667MMAES, Perkins, Roy, 340 North Street
November 7, 2011, 11:48 p.m. citation issued at 326 Madison
Avenue for sleeping "in the open after 11 PM..."

2011-49873MMAES, Holloway, David Mark, 245 Ameilia Av, DeLand
November 10, 2011, 1:00 a.m., citation issued for sleeping at
the rear of a business on Orange Avenue.

2011-49995MMAES, Houghtaling, James, 340 North Street
November 15, 2011, 2:48 a.m. citation issued for sleeping in
public in 500 block of N. Atlantic Avenue.

2011-49996, Kuhn, David, Bradenton address
Same as Mr. Houghtaling, listed immediately above.

2011-50716MMAES, Stanton, Heath, 340 North Street
November 25, 2011, 12:13 p.m., citation issued for sleeping on a
city bench in the 600 block of S. Beach Street.

2011-50721MMAES, Williams, Teddy Joe, 340 North Street
November 24, 2011 at 12:21 a.m., citation issued at 1027 Mason
Avenue for sleeping "on a mattress in plain view."

2011-50760MMAES, Brown, Paul, General Delivery
November 25, 2011, 11:51 a.m., citation issued at 1286 N. Nova
Road for sleeping "in between building on a homemade bed made
out of a cardboard box."

2011-51165MMAES, Logsdon, Gregg, 340 North Street
December 8, 2011 at 1:47 a.m. at 126 East Orange Avenue sleeping
on a bench.

2011-51639MMAES, Albert, Ralph G. 340 North Street
December 18, 2011, at 2:42 a.m. in the 500 block of Madison
Avenue, citation issued for sleeping in the open in a vacant
lot.

2011-51491MMAES, Kent, Clifford, 340 North Street
December 13, 2011, 1:50 a.m. at 340 North Street Mr. Kent was
issued a citation for sleeping on a bench at the homeless
coalition.

2011-51483MMAES, Martin, Mary, 340 North Street
December 13, 2011 at 12:52 a.m. at 162 Madison Avenue, citation
issued for sleeping on the sidewalk.

2011-51655MMAES, Greene, Michael Raymond, 340 North Street
December 17, 2011 at 11:17 p.m. at 971 West ISB Blvd. "sleeping
in the open."

2011-51656MMAES, Sturgill, Steven Neill, 340 North Street
December 18, 2011 at 12:16 a.m. at 1232 8th Street, citation
issued for "sleeping in the open" at a vacant lot at this
location.

2011-51657MMAES, Jackson, Lee, 340 North Street
Same facts as Mr. Sturgill, immediately above.

2011-51658MMAES, Gomillion, Raymond, 340 North Street
Same facts as Mr. Sturgill, immediately above.

2011-51663MMAES, Arrowood, Pamela, 340 North Street
December 18, 2011, 2:54 a.m. 500 block of Madison, vacant lot,
issued.

2011-51804MMAES, Peeples, Barrett A., 340 North Street
December 19, 2011, 11:37 p.m., 633 Mulberry Street, citation
issued for "sleeping in the open."

2011-51805MMAES, Johnson, Veronica Lynn, 340 North Street
Same facts as Mr. Peeples, immediately above.

2011-51806MMAES, Martin, Edward W. 340 North Street
December 20, 2011, 12:18 a.m. sleeping on a sidewalk at
intersection of Madison and Ridgewood Avenues.